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## REDUCTION OF TRIAL ISSUES UNDER WISCONSIN PRACTICE

J. G. HARDGROVE\*

FOR sometime past there has been in progress a movement drawing support from the bench, the bar and the law school men looking toward the assertion by or the vesting in the judiciary of complete control over and regulation of judicial proceedings. This has been termed the rule-making power. The thought is that the Legislature ought to be limited to the creation of courts and the definition of their jurisdiction, except insofar as those matters are dealt with in the Constitution, and that the manner in which the courts shall function should rest entirely with themselves. It is urged that our method of procedure ought to be sufficiently flexible to allow us to draw as we see fit upon experiences elsewhere—particularly upon the experiences of the administrators of justice in England.

The adoption of the Field Code in New York has always been recognized as a great reform. Yet, in the effort to emphasize the desirability of a flexible and progressive system, we now find references to that code as "a romanized model unhappily adopted"<sup>1</sup> and one "which changed the American judicial establishment from a living stream into a stagnant pool."<sup>2</sup> These statements are striking partly because rhetorical.

Whether it would be wise (and I think it would be) to vest the rule-making power in the judiciary in the unrestrained exercise of that branch of sovereignty comprehended by the judicial power of the state may merit careful consideration. Yet, if tomorrow the courts of this state were given the unqualified power to prescribe and regulate all judicial proceedings, I venture to say that in the first instance they would take as their model the Field Code with the limited changes

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\* J. G. Hardgrove, member of the Milwaukee Bar. This Article is based upon a paper read before the Board of Circuit Judges at Milwaukee, Wisconsin, on November 22, 1927.

<sup>1</sup> Roscoe Pound, Am. Bar. Assn. Report, 1926, p. 290.

<sup>2</sup> Edson R. Sunderland, Am. Bar. Assn. Report, 1926, p. 279.

which Wisconsin has made since adopting it. To a Wisconsin lawyer, the Federal Equity Rules adopted by the Supreme Court of the United States some years ago seemed quite familiar indeed. It is not just to lay the blame for such want of progress as there has been on the framers of the Code. The responsibility rests in a large measure with the bench and the bar in their failure properly to use, administer and develop some of the provisions inserted for the purpose of simplifying and reducing issues in advance of a trial. Nor have we reason to be pessimistic about Wisconsin practice. The movement for the simplification of practice, of which that for the recognition or investing of the rule-making power forms part, has received its impetus in states which lag far behind ours in this matter. Much has been accomplished, but much more may be accomplished.

Under the powers given under our statutes to require a pleading to be made more definite and certain,<sup>3</sup> to restrict parties to the character of allegations and denials essential to guard against frivolity,<sup>4</sup> to strike out frivolous<sup>5</sup> and sham<sup>6</sup> pleadings, to combine motions therefor,<sup>7</sup> to require the furnishing of a bill of particulars<sup>8</sup> and many other provisions in our law, the circuit court has nearly all the power that is now exercised under the English system of practice.

Once having exercised the power to require parties to reduce their issues to the last analysis, the court may, if it finds that any part of a plaintiff's claim is admitted to be just, require its satisfaction in advance of the trial.<sup>9</sup> The court is not powerless simply because of the fact that its trial calendar may be crowded. Litigants complain little of that delay which is due merely to a crowded calendar. But when the law's delay is due to the ability of a party to take advantage of something purely technical in the law to postpone the disposition of one matter as to which there is no dispute simply because there may be a

<sup>3</sup> Sec. 263.43, Wis. Stats.; *McIntyre v. Carroll*, — Wis. —; 214 N.W. 366; *Lowver v. Lynch*, 191 Wis. 99; *Union Nat. B. of Chi. v. Cross*, 100 Wis. 174.

<sup>4</sup> Sec. 263.13 and 263.24, Wis. Stats.; *Sweet v. Davis*, 90 Wis. 409; *Carpenter v. Rolling*, 107 Wis. 559; *Mathews v. Pufall*, 140 Wis. 655; *Union Lumbering Co. v. Chippewa County*, 47 Wis. 245; *State ex rel. Kennedy v. McGarry*, 21 Wis. 496; *Hathaway v. Baldwin*, 17 Wis. 616; *Elmore v. Hill*, 46 Wis. 618; *Goodell v. Blumer*, 41 Wis. 436; *Mills v. Jefferson*, 20 Wis. 50. Sec. 263.24, Wis. Stats.

<sup>5</sup> Sec. 263.41, Wis. Stats.; *Mathews v. Pufal*, 140 Wis. 655; *Motowski v. People's Dentists of Wis.*, 183 Wis. 477; See, also, cases cited under note (4).

<sup>6</sup> Sec. 263.42, Wis. Stats.; *Pfister v. Wells*, 92 Wis. 171; *Pearson v. Neeves*, 92 Wis. 319.

<sup>7</sup> Sec. 263.44, Wis. Stats.; *McIntyre v. Carroll*, — Wis. —; 214 N.W. 366.

<sup>8</sup> Sec. 263.32, Wis. Stats.

<sup>9</sup> Sec. 270.63, Wis. Stats.; *Lathrop v. Snyder*, 17 Wis. 110; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 338; *Sellers v. Union Line Co.*, 36 Wis. 398; *Edward E. Gillen Co. v. John H. Parker Co.*, 170 Wis. 264, at 285.

dispute on some other matter, there comes into play dissatisfaction with the machinery of justice and discontent.

At the last session of the Legislature, in response to a movement initiated by the board of circuit judges, there was enacted a statute providing for admissions for the purpose of trial (Section 327.22 Wis. Stats.). This adds very materially to the machinery in the hands of the bench and the bar calculated to reduce litigation in each action to the points of fact and law which are really in dispute. I will reserve consideration of that statute for a later part of this discussion.

For a long time there was a disposition to approach the practice motion as a mere technicality. The word "technicality" has come to be used generally as descriptive of what I would call an objectionable technicality. An objectionable technicality in connection with pleadings is any attempt in any pleading, affirmative or defensive, to make a statement or denial which will necessitate the trial of an issue merely because hypothetically it will lay the basis for a given line of evidence, although no such evidence is in possession of the pleader. By way of illustration, suppose that in a fraud case the plaintiff pleads that the defendant falsely represented a given state of facts and that the defendant meets this with a general denial. Both pleaders may be guilty of a technicality. The plaintiff should have pleaded that the defendant represented the existence of the given state of facts and that the representation was false. The defendant is justified from the technical standpoint in meeting the allegation with a general denial, even though he knows that the representation was made, if he expects to support his pleading by proof that the representation was true. If the defendant were to attack the complaint by a motion to make definite and certain and the plaintiff were to oppose the motion, it is the plaintiff who would be guilty of a resort to technicality. If the plaintiff were to attack the answer by a motion to make definite and certain or by a motion for a bill of particulars requiring the defendant to state separately the fact as to whether he made the statement and the fact as to whether the statement was true or false, the attack would be for the purpose of removing a technicality and the defendant would be guilty of unfair resort to a technicality in contesting the motion. No attack made on a pleading for the purpose of promoting certainty of issues may justly be characterized as a technicality. Professor Sunderland, of Michigan, in one breath states that the great feature of English litigation "is the freedom from all *technicalities*." In the next breath he points out that the differentiation of the profession into barristers and solicitors must unquestionably produce "a better average *technique* than the mixed work of the American lawyer."<sup>10</sup> It is not to be ex-

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<sup>10</sup> Wis. State Bar Assn. Reports, 1925, p. 164.

pected that the technique will be greatly improved if every attack made on a pleading drawn either carelessly or deliberately loosely is swept aside as a technicality. The court should carefully consider, in each case, whether technicality lies in the practice motion or in the pleading which is attacked thereunder.

The reduction of issues necessarily includes the elimination of those that are seeming only and the clarification of those which are real. The real points of difference are more clearly defined. In this process, each party and his attorney are forced to re-examine the facts and each attorney becomes better able to judge of the merits of his client's claim or defense. This will often mean settlement—and a settlement that is made judiciously, with full knowledge of both facts and law and with a more nearly just and proper estimate on each side of the merits of the case. I have used the expression "settlement that is made judiciously." If a court or judge thus forces parties and counsel carefully to study and reweigh the evidence and to reconsider the law, he may well feel that any resulting settlement has been fair and just and not a mere compromise by "splitting the difference."

After all, we are considering exceptional cases. It is fair to say that a very large proportion of the controversies in which lawyers are consulted are disposed of without the commencement of any action. In the larger cities, at least, it is also true that only a relatively small portion of the actions which are commenced are brought to trial. They are disposed of by the attorneys in settlements which, in the majority of cases, are very carefully and deliberately worked out. These settlements have been made possible in a great many cases through the use of the discovery examination. The lawyers of Wisconsin have become quite skillful in the use of this examination. Many of them use it either solely or partly for the purpose of reducing the issues, much after the manner in which that is sought to be done elsewhere by a bill of particulars. After examinations have been had on both sides, it is a very common thing for the opposing attorneys to sit down and discuss the case anew with the issues for trial more clearly defined in the minds of the attorneys on each side and with all of them better able to judge of the probable result of a trial. The better trained the opposing attorneys are in the sifting of evidence and in the application of the rules of law, the more reason is there to expect that the litigation will terminate in a fair and just settlement.

At a rather early day in this state, the court refused to give to this examination the effect of a bill of discovery under the old equity practice;<sup>11</sup> and it has generally been assumed that it could not be made con-

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<sup>11</sup> *Cleveland v. Burnham*, 60 Wis. 16; *Kelly v. C. & N.W.R.R. Co.*, 60 Wis. 480; *Whereatt v. Ellis*, 65 Wis. 639.

clusive upon the party examined. Very recently a member of the bar of experience and judgment stated to me that he thought that the discovery examination ought now to be given that effect. In other words, that a party having stated a fact in the course of a discovery examination, should be bound by that statement. I would have some hesitancy about going that far, particularly since the examination may now be had immediately upon the service of a complaint on all the points covered by the complaint at the instance of either party and on but five days' notice. A party might, on such short notice, very well make some statements in the course of a discovery examination which were the result of a misunderstanding of the questions, a lack of information or a failure to distinguish between information and knowledge.

It would seem, however, that the discovery examination might well be used in support of a motion to attack a pleading as sham. A sham pleading is a pleading false to the knowledge of the party by whom it is made. It may be frivolous on its face or it may not be. Without regard to whether it states a cause of action, on the one hand, or a defense, on the other, it should be stricken whenever it develops that it is false to the knowledge of the pleader. To illustrate: A plaintiff serves an unverified complaint. A defendant interposes an unverified answer containing a general denial. The plaintiff moves to strike out the answer as sham, supporting his motion by affidavits showing that the answer is untrue. If there be no opposing affidavit, the answer must be stricken out.

However, Section 263.42, Wis. Stats., provides that "no defense shall be deemed sham the truth of which shall be *supported* by the *affidavit* of a *single witness* either by way of verification to the pleadings or in opposing a motion to strike out." In this connection, let us take another illustration. It is a situation which might frequently arise. A party verifies a complaint or an answer asserting or denying some matter essential to a cause of action or a defense, as the case may be. The pleading cannot now be attacked as sham because it is supported by an affidavit. The party interposing the pleading is then examined. The opposing party should, under those circumstances, be permitted to attack the pleading as sham for the reason that it is *no longer supported by affidavit*. The affidavit of verification is impeached by the solemn deposition of the affiant. Suppose that we had an unverified pleading and that this same party interposed an affidavit containing in one paragraph an affirmation and in another paragraph a negation of the pleading in a vital matter. Could it be said that the affidavit so tendered supported the pleading? Suppose he filed two affidavits, one in affirmation and one in negation of the pleading. Could it then be said that the pleading was supported by affidavit? It is respectfully submitted

that the situation is in no wise changed if the pleading be affirmed in the affidavit of verification and negatived in the solemn deposition over the signature of the affiant.

This is not put forth with the suggestion that a hard and fast rule should be adopted on this subject. If the court, on a consideration of the discovery examination and of the affidavit of verification, sees that under the discovery statute and his deposition taken therein, over his signature, is filed containing a statement which negatives his pleading, the pleading is in fact sham, it should be stricken out and judgment should be entered accordingly. If it be argued that the statements in the discovery examination are the result of confusion, misunderstanding, mistake or misinformation, all of these things may be taken into consideration by the court in determining whether the pleading is sham. The question should be regarded as addressed to the sound discretion of the court. The motion should be looked upon as demanding of the attorney seeking to support the pleading diligence in the ascertainment of the facts, reasonable skill in the separation of conclusions of fact and evidence and in the separation of the conclusions of law and fact and in counsel to his client. It is not fair to the court, to the public or to his opponent to compel all to mark time while the evidence is sifted in upon the trial and a conclusion is reached by the tryers of fact, whether a judge or a jury.

In the course of this paper, reference is made to cases which have come under my observation, most of which have never proceeded beyond a trial court. An early instance illustrates an attack on a pleading in which the pleader was forced to disclose that it was merely frivolous. In answer to a complaint on a promissory note, the defendant pleaded a contemporaneous agreement modifying his obligation. It presented an issue preventing judgment without trial. On a motion to make definite and certain, the defendant was required to state whether the agreement was oral or in writing. Taking the full time allowed to him under the order, he amended the answer, stating that the agreement was oral. A demurrer was interposed and sustained. The defendant failing to plead over within twenty days, judgment was taken by default. The technicality was not in the motion nor in the demurrer, but in the answer. In the light of a more mature experience, it would seem clear that had the plaintiff asked in his motion to have the answer made definite and certain and for judgment on the pleadings in the event that it developed that the contemporaneous agreement was oral, it would have been proper practice for the court to require the defendant to make the statement and to amend his answer *instanter* and, upon that being done, to have ordered judgment against him. Such a judgment would, no doubt, be sustained today.

Whenever any pleading is verified, every subsequent pleading must likewise be verified. Facts must then be stated either on knowledge or on information and belief;<sup>12</sup> and denials must be either direct on information and belief or "of any knowledge or information . . . sufficient to form a belief."<sup>13</sup> If a party denies knowledge or information sufficient to form a belief on a matter which must necessarily be within his knowledge<sup>14</sup> or which is a matter of public record readily available to him,<sup>15</sup> his denial is evasive and frivolous, raises no issue and should be stricken out or disregarded. Most of the decisions dealing with this subject have arisen in connection with answers, but there is no reason why the same rule should not be applied to an amended complaint which the plaintiff is compelled to verify by reason of the verification of an answer previously served. Any pleading on information and belief, where the party is compelled to verify and may reasonably be required to plead of his own knowledge, is frivolous and ought to be so treated on any motion directed thereto.

A very effective method of compelling a reduction and simplification of issues which is all to little used is the bill of particulars. By a well directed question under a bill of particulars, a party may be compelled to disclose the specific state of fact upon which he makes a general allegation or denial. It can be used very effectively to compel a separation of a mixed conclusion of law and fact, or to compel a sifting of evidence and a clear and definite statement of an ultimate conclusion of fact drawn therefrom. A bill of particulars may be had not merely in an action on account. In an action on account, it may be had by demanding it; and, if it is not given in complete form, a further account can be ordered; and this order may be made either by the court, a judge thereof, a county judge or a court commissioner.<sup>16</sup> It may be ordered in an action in tort.<sup>17</sup> The court may order a bill of particulars "of the claim of either party" to be furnished in any case. That means that a defendant may be compelled to particularize his defense.<sup>18</sup> There may be an allegation in a complaint which is denied generally by the answer. On analysis, it may appear that this

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<sup>12</sup> See *Klauber v. Wright*, 52 Wis. 303.

<sup>13</sup> Sec. 263.25, Wis. Stats.

<sup>14</sup> Sec. 263.13, Wis. Stats.

<sup>15</sup> *Mathews v. Pufall*, 140 Wis. 655; *Sweet v. Davis*, 90 Wis. 409; *Carpenter v. Rolling*, 107 Wis. 559; *Mills v. Jefferson*, 20 Wis. 50; *Elmore v. Hill*, 46 Wis. 618; *Goodell v. Blumer*, 41 Wis. 436.

<sup>16</sup> *Union Lumbering Co. v. Chippewa County*, 47 Wis. 245; *State ex rel. Kennedy v. McGary*, 21 Wis. 502; *Hathaway v. Baldwin*, 17 Wis. 616; *Elmore v. Hill*, 46 Wis. 618; *Goodell v. Blumer*, 41 Wis. 436.

<sup>17</sup> Sec. 263.32, Wis. Stats.

<sup>18</sup> *Barney v. Hartford*, 73 Wis. 95.



denial is the result of a combination conclusion of fact and law. A well directed question under a bill of particulars may compel the disclosure of the specific state of facts contended for by the defendant and the specific theory upon which he interposes what is in form a general denial. He may be compelled to state on the record the precise facts to which applies what the court may be satisfied is a false conception of the law. The court, as stated, may require the defendant to particularize a claim of defense.<sup>19</sup> The office of the bill of particulars is not to set forth the cause of action or the ground of defense. Its chief office is to amplify a pleading and more minutely to specify the claim or defense set up.<sup>20</sup> If an answer be sufficient as a pleading but indefinite as to details, the plaintiff has a right to call for a bill of particulars, either as to matters of direct defense, set-off or counter-claim.<sup>21</sup> Its proper office is to inform the opposing party and the court of the precise nature and character of the cause of action or defense.<sup>22</sup> It is properly an amplification of the pleading designed to make more specific the general allegations appearing therein.<sup>23</sup> It granting or refusal generally lies within the sound discretion of the court upon the particular facts of the case.<sup>23</sup> Nor is it an idle thing. There are well reasoned authorities, which would probably be followed in this state, to the effect that a variance or discrepancy between the bill of particulars and the pleading so repugnant and contradictory when construed together as to be irreconcilable is fatal on demurrer to the pleading.<sup>24</sup> In other words, the bill of particulars becomes a part of the pleading; and, if the bill of particulars, read into the pleading, makes it defective, the pleading can be attacked by demurrer or on a motion for judgment on the pleadings.

I have in mind an action by several tenants in common for specific performance of a contract entered into by one of their number on behalf of himself and his co-tenants, under which the defendant agreed to purchase and to make payment partly in cash and partly by giving notes secured by mortgage. In his answer, he admitted that the contract had been executed by himself and by the plaintiff mentioned "individually and ostensibly as agent for certain third persons therein mentioned," and then denied each allegation in the complaint except as admitted. In his discovery examination, he had insisted that he was entitled to have the contract carried out. This, coupled with the plaintiff's affirmation of authority, was inconsistent with a denial of the

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<sup>19</sup> *Conover v. Knight*, 84 Wis. 639; 3 *Enc. Pl. & Pr.* 525.

<sup>20</sup> 3 *Enc. Pl. & Pr.* 519.

<sup>21</sup> 3 *Enc. Pl. & Pr.* 525.

<sup>22</sup> 31 *Cyc.* 565.

<sup>23</sup> 31 *Cyc.* 565.

<sup>24</sup> 31 *Cyc.* 571.

authority and the court very properly ordered him, on motion, to make the answer more definite and certain by either expressly admitting or expressly denying the authority of the plaintiff named to enter into the contract pleaded. It was clear that his general denial was groundless and it was highly proper for the court to compel him to be specific. This was as an order to make his answer more definite and certain. It might also have taken the form of an order for a bill of particulars of the defense. The general denial also put in issue the title of the plaintiffs. The denial was in positive terms. That meant that he knew the facts in respect to the title. Taking him at his word, the court ordered him either expressly to admit or expressly to deny the title of the plaintiffs and, in the event of a denial, to set forth the particular defects in the title of which he complained. In his amended answer, he then specified certain defects in the title, none of which were substantial and in respect to each of which he could have been made good if his pleading were sustained by a relatively small allowance by way of offset. He was also compelled by the order to state specifically whether he intended to perform the contract on his part or whether he elected to treat it as terminated for conditions broken. In his amended answer, he took the position that he always had intended and still intended to perform the contract. The selling price under the contract was about \$60,000, of which about \$13,000 was to be paid in cash. When the issues were finally settled, it was not, in fact, a \$60,000 lawsuit. The amount in dispute did not amount to \$1,000. A proper disposition of the case following the amended answer would have been to enter an order requiring the defendant to satisfy that part of the claim admitted to be just and to enforce that order as the court would have enforced a final judgment. Clearly, the court would have had the power to grant such relief under Section 270.63. The court could, at least, have compelled the defendant to accept a conveyance and to execute and deposit notes and mortgage called for under his contract and to make the cash payment thereunder less such amount as might be necessary to clear up the few relatively immaterial defects of which he complained.

This statute provides that if, in an action on contract, the answer admits any part of the plaintiff's claim to be just or sets up a counterclaim or set off for less than the amount of the plaintiff's claim and contains no other defense, the clerk shall enter judgment for the amount admitted or for the amount claimed after deducting the amount of the counterclaim or set-off. It also provides that when the answer in any case, expressly or by not denying, admits part of the plaintiff's claim to be just, the court may, on motion, order the defendant to satisfy that part of the claim and may enforce the order as it enforces a

judgment or provisional remedy.<sup>25</sup> This remedy seems seldom to be invoked. It is believed that situations in which it could be invoked are constantly arising. Members of the bar ought without hesitancy to resort to it and the courts ought by the manner in which they meet applications thereunder to encourage resort thereto.

Let us turn now to a consideration of the new statute providing for the notice to admit, enacted by Chapter 316 of the Laws of 1927. It reads as follows:

327.22 (1) Any party to an action may, by *notice* in writing delivered not later than ten days before the trial, *call* upon any other party within five days after receiving the notice, to *admit or deny* under oath, or to *state* under oath *what the fact is*, according to the best of his knowledge, information and belief with regard to, or to *state* under oath that *he has no knowledge or information* sufficient to form a belief with regard to:

(a) the *existence, due execution, correctness, validity, signing, sending or receiving of any document, or,*

(b) the *correctness of any specific fact or facts* material in the action and *stated in the notice.*

(2) Such admission if made shall be taken as conclusive evidence against the party making it, but only for that particular action and in favor of the party giving the notice; it shall not be used against him in any other action or proceeding or on any other occasion, and shall not be received in evidence in any other action or trial.

(3) If the party receiving such notice fails to comply therewith within the time specified, the facts therein stated shall be taken to be admitted.

(4) In case of refusal to make such admission *the reasonable expense of proving* any fact or document mentioned in the notice *shall be paid by the party so notified* in any event, unless the court is satisfied the refusal was reasonable.

(5) The court may allow the party making any such admission to withdraw or amend it upon such terms as may be just and may, for good cause shown, relieve a party from the consequences of a default.

This statute will be of little value unless the members of the bar familiarize themselves therewith, give careful study to the manner in which it may be used and use it. Responsibility for this must rest primarily upon the bar. If the members of the bar will use it and if the courts will in their turn vigorously exercise the power thereby vested in them to impose the reasonable expense of proving facts which ought to have been admitted, it will prove of great value.

Almost immediately after its publication, I saw a very effective use of this statute. An action had been brought on a contract in which the defendant had agreed to indemnify the plaintiff against failure of title to certain lands covered by a mortgage sold to the plaintiff. The mort-

<sup>25</sup> 3 *Enc. Pl. & Pr.* 543.

gager had made an entry under the homestead laws; but had died before the time when he would have been entitled to a patent. It was alleged in the complaint that his sole heir was a minor son. It was alleged in the answer that his heirs were a brother and a sister, that a patent had subsequently been issued to the heirs and that these heirs were ready to confirm the lien of the mortgage. That a minor could not do. The plaintiff had been endeavoring to locate the former wife of the mortgager; and finally succeeded in doing so in one of the Pacific states. The defendant's attorneys were immediately so advised and called upon to admit the fact and told that the demand was made with the intention of asking the imposition on the defendant of the entire expense of proving the fact if the demand were not complied with. Within forty-eight hours, they replied stating that they were ready to sign a stipulation as to the fact. This left in the case no substantial issue except that of damages; and an agreement on the subject of damages was arrived at and the case was disposed of without trial. If it were not for the fact that this remedy was thus open, the plaintiff would have been compelled to employ counsel, to instruct them, to have them communicate with the witness and to prepare for the taking of the deposition, to issue a notice and to forward instructions to the officer before whom the deposition was to be taken and, in addition, to pay the fees of the officer and of the witness. Under this statute, the plaintiff whether successful in the action or not, would have been entitled to an order allowing to him the entire expense, including a reasonable allowance for the services of his attorneys and their corresponding counsel.

Those who have used the offer of judgment,<sup>26, 27</sup> and it is indeed strange that it is so little used, know the advantage of trying an action at the adversary's expense. I have seen this situation: A discovery examination was under way in an action for an accounting in which it was admitted that the defendant was liable in some amount. It was plain that the examination would be extended and costly. During the noon intermission on the first day, the defendant's counsel prevailed on him to make an offer of judgment for \$4,000, an amount certain to cover the liability on any theory which to the defendant and his counsel seemed possible of being maintained against him. From the moment of the offer, the liability for costs would be reversed if the recovery were less. By the time the case was ready for trial several months later, the plaintiff became satisfied that a recovery in this amount could not be had, and offered to settle at \$4,000. The answer was,

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<sup>26</sup> Sec. 270.63, Wis. Stats.; *Lathrop v. Snyder*, 17 Wis. 110; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 338; *Sellers v. Union Lumbering Co.*, 36 Wis. 398.

<sup>27</sup> Sec. 269.02, Wis. Stats.

"No, you are too late. That offer was made so that we might try this lawsuit at your expense instead of ours." The result was a settlement at \$3,200. If the offer had not been made, the plaintiff would have gone to trial, because certain of recovery and certain of costs. The notice to admit statute will operate in the same manner but with greater force since the recalcitrant litigant must face a possible liability, not for limited statutory costs, but for the reasonable expense of proving any fact which he ought to have admitted.

So much of this statute as relates to the admission of the existence, due execution, correctness, validity, signing, sending or receiving of any document is quite similar to Section 327.22, formerly Section 4184, under which either party may exhibit to the other any paper with request for admission in writing of its genuineness with substantially the same results. The latter section seems not to have been used to any considerable extent. Possibly that may have been due to the fact that it was generally assumed to have too narrow a meaning. There will be no room for that fear under the present general notice to admit statute. The more striking feature of the new statute is that a party may be called upon to admit or deny "the correctness of *any specific fact or facts* material in the action and stated in the notice." There is no limitation whatever upon the character of the fact which a party may be called upon to admit. It will apply in every form of action and to affirmative or defensive matter.

The important thing for the attorney who seeks to invoke this statute is properly to frame his statement of the fact which he would have admitted. New York adopted, in a somewhat different form, the same statute, which has its origin in Rule 4 of Order XXXII of the Rules of Practice of the Supreme Court of England. (Section 323, New York Civil Practice Act.) Discussions of the New York act will be found in reports of the Supreme Court and the Appellate Division.<sup>28</sup> I have not been able to find any in the Court of Appeals. It is not to be expected that any considerable number of cases dealing with statutes of this character will be found in the appellate courts. The application of the statute must necessarily rest in the sound discretion of the trial court; and it is not often that any matters arising thereunder will reach the appellate courts on the charge of an abuse of discretion.

Under the New York statute, application can be made to the court or a judge at any time to relieve a party from the necessity of making

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<sup>28</sup> *Koppel Industrial Car & E. Co. v. Portalis & Co., Ltd.*, 195 N.Y.S. 24; 118 Misc. Rep. 670; *Colonial Knitting Mills, Inc., v. Hosiery Mfrs. Corp.*, 199 N.Y.S. 854; 120 Misc. Rep. 558; *Corr v. Hoffman*, 220 N.Y.S. 713; 128 Misc. Rep. 713.

answer to a demand. Motions of this character are, therefore, likely to be made in New York where they will not be made in Wisconsin.

A somewhat interesting discussion of the statute will be found by Justice Cohalan in *Koppel Industrial Car & Equipment Co. v. Portalis & Co., Limited*, 195 N.Y.S., 24; 118 Misc. Rep. 670. In that case, some of the matters to be guarded against are thus stated:

Frequently it will be for the best interests of justice to strike out requests for admissions, even though on their face, taken in conjunction with the pleadings, they appear to be matters that should be the subject of admission. For in some cases what might seem, from the pleadings and demand, to be a fact that should be admitted without putting the adversary to the trouble and cost incident to proof may be an admission that with other evidence introduced at the trial would place a fact in a far different light than the party admitting had intended. . . .

Nor did this section contemplate that a party might require an adversary to admit a fact to ascertain the truth or falsity of which would put that adversary to trouble and expense. . . .

The purpose of the section, as well as the general scope of the new Practice Act and Rules, is to simplify the issues, shorten the trial, and save time and expense in matters that can be proven, but whose proof will necessarily impose labor and expense on the party seeking to prove them which in justice should not be imposed. . . .

It should, as I have already indicated, apply to *admissible* facts; to an *entire* fact, nor a *half* fact; to facts the truth or falsity of which the party *may ascertain without much trouble or expense*, and *without basing them on opinion*. . . .

In *Colonial Knitting Mills, Inc. v. Hosiery Mfrs.' Corporation*, 199 N.Y.S. 854; 120 Misc. Rep. 558, Justice Mullan says:

Except for slight variations, the section in question is an enactment of rule 4 of Order XXXII of the Rules of Practice of the Supreme Court of England. See White, K. & S. An. Prac. 1922, p. 531. It seems to be the practice in England to require the party receiving the "notice to admit," as it is called there, to decide for himself whether he should make the admissions demanded or take the risk of being compelled, after the proofs are all in at the trial, to bear such expense as his adversary might be put to in procuring the evidence necessitated by the refusal to admit. *Crawford v. Chorley*, Wkly. Notes (1883) at page 198, cited by White, K. & S., *supra*, 532, and in 23 Halsbury Laws of England, 146. . . .

We may assume that the courts of this state will deal with our statute in the manner indicated in the language just quoted. In determining whether to impose the expense of proving any specific fact, the admission of which has been demanded and refused, the courts will, in the main, direct their inquiry to the question as to whether, under the circumstances of the particular case, the party upon whom the call is made ought to have admitted the fact in the form in which it

was stated in the notice. The attorney should, therefore, state the fact in the notice in the form in which he may fairly expect his opponent to stipulate to the fact. If he puts into his proposed statement of the fact anything which, with the knowledge and information available to his opponent, the latter ought not to be expected to admit, he is not likely to be given the benefit of the statute. He ought to frame his proposed statement fairly, bearing in mind that he cannot ask a "half fact," and that he must not ask the admission of something *in addition* to the entire fact.

The issue in a case may be as to what were the terms of an oral contract. After a careful study of the facts and a review thereof, let us say, following discovery examinations, either attorney ought to be able carefully to analyze and clearly and succinctly to state the terms of the oral contract. That statement may take a form somewhat different from what it would be expected to take in a pleading. It may be found, when the attempt is made to state the fact, that the parties are not in disagreement except in respect to the law applicable thereto.

There may be an issue raised by the pleadings as to the breach of a contract. It may be found, when either party attempts to state the facts relating to the breach, that there is no substantial dispute as to what actually occurred, but that there is a dispute in respect to the effect of what was done as constituting a breach of the contract. It is probable that in such situations the court would very often feel that the proposed statement of one party or the other ought to have been accepted and will enforce the statute accordingly. In contract actions, market value may often be a very important question; and, in very many cases, there ought not to be any dispute about it. The party who is ready to propose a fair statement ought to be given the benefit of the statute.

It is difficult to formulate in advance the possible applications of the statute in tort actions. Undoubtedly, it could be applied very well on a question relating to property damage. It would be difficult to apply it on a question of damages resulting from personal injury. It might be difficult to apply it in a negligence case to the abstract questions of negligence, proximate cause or contributory negligence; and yet it might be applicable to certain subsidiary facts bearing upon one or more of these questions, such as speed, the right of way in automobile accident cases, the physical surroundings, the condition of an automobile or other piece of machinery or the physical condition of the actors in the case under consideration.

The issue in ejectment may be title. The plaintiff must prove it. Notwithstanding the issue in the pleadings, there may be no dispute on the fact as to title up to a given point, and yet its proof may be

burdensome. The notice to admit should dispose of it. Records of quasi-public corporations and private records may be certain but difficult of formal proof. The party resorting to the notice may lay such data before his opponent before giving the notice as to leave no proper excuse for the failure to admit. In order to prove one fact from public records, whether of this state or of another state, it may sometimes be necessary to procure quite voluminous copies dealing with other facts. The notice to admit would serve to simplify and in many cases render unnecessary a burdensome investigation and the accumulation of an excessive amount of information by way of copies or otherwise.

I have in mind a certain action against a railroad company for an injury received in an eastern city. The case was for trial here. Before the investigation of the facts was completed the physical situation in the railroad yards, the layout of the tracks and their relation to certain street crossings, became of great importance. The time when two trains passed certain blocks, just before passing the point at which the injury took place was also important, and could be ascertained to a certainty from an examination of the records of the railroad company. Yet, its proof would involve quite a burdensome task in the taking of depositions and the procuring of copies, and so forth. It would seem that, had it been necessary to go to trial in this case, and had we this statute in force at the time, the defendants, might properly collect the information in abstract form and lay it before the other side, with such information as would be necessary to satisfy them as to its correctness, and then follow that with a notice to admit the facts in respect thereto. If they refused to admit those facts and if upon the trial it was apparent that the defendants had dealt entirely fairly, it would be proper to put the cost of proving the facts upon the plaintiff.

I will give another illustration of a fact which it would have been necessary to prove in that case. There was quite a lengthy train made up of the locomotive, mail cars, express cars, coaches, parlor cars and sleeping cars. The length of the train would have a direct bearing upon the point at which the plaintiff alighted from the train, and that would have direct bearing upon the question of contributory negligence. So it became imperative to prove this train record. The railroad company had a record of all the cars that went into the train by number, but at the time for trial those cars would be distributed in many different places throughout the country. Proof of the length of the train and its location, the location of each car in the train and the length of each car, would have meant very heavy expense; and yet it was a fact as to which it would have been reasonable to ask the plaintiff to accept the railroad company's records as to the make-up of the train on the night in question, and the records of the railroad company and the Pullman



Company in respect to the design of the various cars in the train. That, it seemed to me, would have been a proper case, had it been necessary to go to trial, for the application of the notice to admit.

The form of the notice may be very simple except in respect to the statement of the specific fact or facts set forth therein. Careful and painstaking lawyers, after a study of this statute and its possibilities, are quite certain to make use of it. How soon it will become of general use, it is difficult to say. The offer of judgment is a very effective weapon and yet it has been used but little. Some men seem to fear that if they were to make an offer of judgment, the fact would in some way become known to the jury. There is no occasion for any such fear. I believe there will not be the same hesitancy on the part of the members of the bar in respect to the use of the notice to admit. When it is carefully analyzed, its effectiveness as a weapon against an unfair or unreasonable opponent is so apparent that it is quite certain to come into general use.

Careful and painstaking lawyers will be able to work out the manner of stating the fact proposed for admission in many different forms of action. Precedents in published reports are not many; and precedents in reports of appellate courts are never likely to be numerous and are not likely to be available in this country or in this state for some time to come. They are likely to be available in the trial courts, not in the form of rulings thereon by trial court judges, but in the form of pleadings and notices prepared by skilled and studious members of the bar. I venture to suggest that if, as notices to admit are served and filed in connection with pleadings, these were abstracted and reported and distributed through some agency, somewhat after the manner in which the work of taxing bodies and other departmental boards are now unofficially reported, they would be very much sought after by members of the bar, and would form models for other efforts which, in time, would be very helpful and would insure the most effective use and enforcement of the statute. It would prove helpful if through the clerks of the various courts of record or otherwise, there were directed to the attention of some central body for editing and reporting instances of the use of the notice to admit. It is possible that this might be worked out through the State Bar Association and its affiliated local associations.

In this same connection it might be well to bear in mind that precedents for motions aimed at the reduction and simplification of trial issues are not likely to be found in an appellate court; and that many of these might also be so reported. Intelligently framed, they will prove very helpful in trial courts. Any one of these motions can be made before the presiding judge, and on five days' notice instead of eight, except in the case of a motion for a bill of particulars. I see no reason why the statute relating to the bill of particulars ought not to be amended

so as to permit the motion therefor also to be passed upon by the presiding judge. That would add greatly to his power to limit and simplify the issues. By the proper use of the practice motion, the presiding judge can force the simplification and reduction of issues almost as readily as can the master under the English system. The proceeding before the presiding judge may be somewhat more informal than that before the court. The combination of a motion to strike as frivolous or sham, or to make more definite and certain, or for a bill of particulars, and for a partial satisfaction of a claim admitted to be just would in many cases leave but very narrow issues for trial, if indeed it would not produce a settlement.

For many years there has been a tendency to emphasize the importance of great liberality in pleadings and in amendments. That is all very well, if the reason therefor is kept well in mind. The purpose is to safeguard against improvident failures to lay the basis for the proof of a meritorious case or defense and against a purely technical objection on the ground of variance after full and fair trial. There is no reason why every lawyer should not work just as carefully in the preparation of his pleading, whether it be a complaint or an answer, as though this extremely liberal rule on construction and on amendments did not exist. Paradoxical as it may seem, I believe that a cultivation of a higher technique will tend to eliminate the "technicalities."<sup>29</sup>

As stated at the outset, I would favor the recognition or the vesting in the courts of the rule making power. Orderly growth, development and adaptation to constantly changing business and social conditions will be best insured if left in the control of the administrators of the remedial law. That is the experience in other lines of activity, both governmental and private. In the meantime, those worthy to be entrusted with the rule-making power may be depended upon to administer in the most progressive spirit a system prescribed by a legislative body.

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<sup>29</sup> In an opinion handed down on February 7, 1928, in the case of *Thomson v. Chicago, Milwaukee & St. Paul Ry. Co., et al.*, (not yet published), — Wis. —, — N.W. —, Mr. Justice Rosenberg said:

"While pleadings should be liberally construed and no litigant having a cause of action should be sent out of court, carefully prepared lawyerlike pleadings are nevertheless a great aid to the administration of justice. The amount of unlaywerlike sloppy, inaccurate pleadings that finds its way into courts of justice is disheartening and indicates either an unbelievable lack of training and ability or an utter indifference and disregard by attorneys of the most elementary and fundamental principles of pleading. Liberalized pleadings may become a hindrance rather than an aid to the attainment of justice. We are moved to make these observations by the difficulties which we have in ascertaining the claims of parties as set out in their pleadings."